

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LAND-O-SUN, LLC

Employer

and

Case 5-UC-405

BAKERY, CONFECTIONERY,
TOBACCO WORKERS AND GRAIN
MILLERS INTERNATIONAL UNION
LOCAL 358

Petitioner

ORDER

The Employer's Request for Review of the Regional Director's administrative dismissal of the petition raises no substantial issues warranting reversal of the Regional Director's action. In denying review, we agree with the Regional Director that the Employer is precluded from seeking to clarify the unit to exclude its clericals on the basis that they are "office clericals." The Employer explicitly included "plant clericals" in the stipulated bargaining unit and the five employees the Employer now seeks to exclude were, at the time of the stipulation, the only "clericals" employed by the Employer at its Richmond location. In seeking now to litigate the status of these employees, the Employer asserts, in effect, that it stipulated to the inclusion of a vacant classification. We find that assertion untenable under the circumstances herein. Therefore, we agree with the Regional Director that, in light of these facts, the Employer "[o]bviously. . . included all five employees as plant clericals."¹ Cf. Premier Living Center, 331 NLRB 123 (2000) (finding that the employer, which specifically stipulated to the inclusion of LPNs, could not thereafter litigate their supervisory status in an attempt to exclude them from the unit); I.O.O.F. Home of Ohio, Inc., 322 NLRB 921 (1997) (holding that the respondent, which had stipulated to the inclusion of LPNs in the certified unit but later withdrew recognition from the union on grounds that it had "reconsidered" and now believed the LPNs to be supervisors, was barred from raising the supervisory issue as a defense to a refusal to bargain allegation). In addition, the Employer included all five clericals on its Excelsior² list and did not challenge these employees' ballots at the election. Finally, the Employer does not allege any changed circumstances affecting the clericals, and has presented no newly discovered or previously unavailable evidence. Accordingly, dismissal of the petition is affirmed.

¹ Contrary to the Employer, Kirkhill Rubber Co., 306 NLRB 559 (1992), is not controlling under the circumstances of this case. There, unlike here, the language of the stipulated election agreement did not specifically refer to leadpersons, and thus was not determinative of the leadpersons' status. In the present case, the stipulated election agreement expressly includes "plant clericals" in the bargaining unit and the Employer employs no clericals other than the ones it now seeks to exclude. Therefore, unlike in the stipulation in Kirkhill Rubber, there is no ambiguity as to the status of the Employer's only clericals.

² Excelsior Underwear, 156 NLRB 1236 (1966).

WILMA B. LIEBMAN, CHAIRMAN

CRAIG BECKER, MEMBER

MARK GASTON PEARCE, MEMBER

Dated, Washington, D.C., August 5, 2010.